



## Law, Democracy and the European Court of Human Rights

O'Connell, R. (2020). *Law, Democracy and the European Court of Human Rights*. Cambridge University Press.  
<https://doi.org/10.1017/9781139547246>

[Link to publication record in Ulster University Research Portal](#)

### Publication Status:

Published (in print/issue): 31/10/2020

### DOI:

<https://doi.org/10.1017/9781139547246>

### Document Version

Publisher's PDF, also known as Version of record

### General rights

Copyright for the publications made accessible via Ulster University's Research Portal is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

### Take down policy

The Research Portal is Ulster University's institutional repository that provides access to Ulster's research outputs. Every effort has been made to ensure that content in the Research Portal does not infringe any person's rights, or applicable UK laws. If you discover content in the Research Portal that you believe breaches copyright or violates any law, please contact [pure-support@ulster.ac.uk](mailto:pure-support@ulster.ac.uk).

## Conclusion: Deliberation, Inclusion and Participation

The survey of the political and electoral rights case law of the European Court of Human Rights reflects a particular approach to the concept of democracy and the Court's vision of how to protect it. Central to the Court's vision is the ideal of a liberal representative democracy with the emphasis placed on protecting the key liberal rights of free expression, assembly and association.

Some of the cases lend support for more substantive visions of democracy. In so far as these seek to restrict the rights of those who would use violence or undermine the principles of pluralism, tolerance and broad-mindedness that are the values of European democracy, the Court is right in principle to accept such restrictions. However, this calls for very careful scrutiny of the restrictions in question to ensure they do not smuggle in excessively substantive conceptions of the social order. Some of the older free expression cases involving public morals are troubling in this regard, as is the 2003 *Refah Partisi* case.

The Court recognises the importance of the more explicitly electoral rights in P1–3, but also indicates caution – usually – when interpreting these rights. It says regularly that the P1–3 rights are not to be applied in the same way as the qualified rights in articles 8–11. It also says that more caution is required in cases concerning the passive right to run for elections as compared to cases on the active right to vote. And when it comes to questions of electoral design, it becomes more cautious again. It is rare indeed to find a judgment where the Court has found a state in breach of the Convention because of the choices it has made in designing an electoral system.

The support for liberal representative democracy does raise questions about whether the Court's approach falls into the trap of replicating democratic flaws in this model of democracy. Representative democracy might be seen as a very limited form of democracy in which most persons simply choose every few years between different groups of leaders. In this sense, most people do not

experience any real exercise of self-government. Furthermore, this model of representative democracy may be a form of aggregative democracy or preference-counting democracy where individuals simply vote their preferences without having the possibility to deliberate on them and exchange views and reasons about different courses of action. Liberal representative democracy also risks marginalising different groups in some contexts. Ethnic, linguistic and religious minorities may not be able to influence the political system in a representative system that after all favours majority rule. In many political systems women are systematically underrepresented, though some European states have made significant strides in this area. The focus on elections for the legislature excludes consideration of other forms of participation and consultation; this is extremely problematic for members of certain groups who can only participate through participation and consultation, such as children and adolescents.

And then there is the influence of money. Underrepresented groups in the political system may include the poor, unemployed and economically disadvantaged. Private wealth has the possibility to shape public decision-making through political donations and advertising as well as social media campaigns and support for different pressure groups. Structural problems lurk here – economic inequality always has the potential to skew political debate; persons struggling to make do will lack resources and time to influence politics; the need for economic prosperity will usually mean that politicians give particular heed to the interests of business.

These are classical concerns with representative democracy even at the best of times. These are not, however, the best of times. In twenty-first-century Europe, we have political leaders who praise ‘illiberal democracy’, governments which seek to use referendums to enhance executive power, a British government willing to suspend parliament for weeks during a major political debate, and a Russian government seemingly indifferent even to fundamental principles of international law. The European Union’s responses to the financial crisis, sovereign debt crisis and migration crisis cast doubt on its ability to respond in ways that are fair, democratic, even humane. And this is in a wider economic context where the economic and political success of democratic Western European states for a few decades in the mid-to-late twentieth century seem very far away and have been overtaken by decades of neoliberalism, the financial crisis and austerity.<sup>1</sup>

<sup>1</sup> Berman notes the importance of those decades of prosperity when liberal democratic states tamed the markets: Sheri Berman, *Democracy and Dictatorship in Europe: From the Ancien Régime to the Present Day* (Oxford University Press 2019), 400–403. Similarly, see Roger

These democratic challenges of the twenty-first century may well reflect the weaknesses of the type of liberal representative democracy envisioned by the Convention. The traditional model of liberal representative democracy may enable some of these problems or even worse may be conducive to them. There has to be some concern that a human rights regime devised largely in the 1940s to deal with certain threats of the mid-twentieth century is limited in how it can respond to twenty-first-century threats. The Convention was drafted with one eye on the past depredations of totalitarian fascist regimes and one eye on the emerging communist regimes behind the Iron Curtain. In numerous ways the threats to human rights, including political rights, in the twenty-first century are significantly different from those facing the Convention drafters.

In part this reflects important changes such as the development of supra-national institutions, the development of globalisation and the increased realisation that non-state actors are vitally important in relation to the protection and promotion of human rights. It also reflects important technological changes such as the rise of the internet and digital media. There is also a concern articulated by Scheppele, that in some ways twenty-first century would-be autocrats have become more subtle and legally astute in how they seize power, or rather how once they win power, they consolidate their position to make it difficult for electoral and civil society opponents to succeed.<sup>2</sup>

Nevertheless, as we know, the Court interprets the Convention in an evolving manner so as to make it an effective instrument for the protection of rights. The concern about the subtle erosion of the ability of electoral opposition and civil society to oppose a government can be addressed if the Court is willing to consider the wider context in which certain restrictive measures are adopted. This fits in well with the Court's own rhetoric and sometimes its practice. It is a sensitive matter: if the Court says that there are some practices which would be fine in the Netherlands or the UK but not Hungary or Poland due to the context, then there are multiple risks. Nevertheless, the Court has indicated it will sometimes take this into account, where, say, a dominant political party adopts measures which disproportionately affect the opposition (*Tănase v Moldova*). Similarly, the Court has somewhat exceptionally invoked article 18 of the Convention as an independent ground of

Eatwell and Matthew Goodwin, *National Populism: The Revolt against Liberal Democracy* (Penguin 2018), chapter 5.

<sup>2</sup> Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545.

criticism where a state has limited rights for purposes not permitted under the Convention (*Navalnyy v Russia*).

Such jurisprudential responses would address some of the concerns that twenty-first-century autocrats are simply more clever than their twentieth-century predecessors. However, it is also necessary to consider whether the model of liberal representative democracy offered by the Convention and the Court can itself be supplemented. The Convention does offer some, albeit limited, resources to address these concerns about the inadequacy of liberal representative democracy and to develop practices that are more deliberative, inclusive and participatory.

A commitment to the importance of democratic deliberation (and to a degree consultation and participation) is seen in some of the case law. The general principles of the Convention reflect very well a deliberative democratic model whereby democratic bodies have the responsibility to legislate for human rights but have to take the content of these rights seriously. The doctrine of the margin of appreciation and the possibility in respect of most rights for there to be proportionate restrictions indicates that the Convention does not presuppose a natural rights model where the content of rights are simply pre-given. Rather, domestic authorities, and in particular the democratically legitimated domestic authorities, have the possibility to shape the content of rights. At the same time this is not an unlimited discretion but one constrained by a need to implement the rights taking account the limits of legitimacy, lawfulness and proportionality. In this sense the discretion of domestic democratic authorities is limited by the rights that are prescribed by the international legal order to which the state has signed up. While this operates at a level of principle, in some instances the Court reviews this closely in terms of how it plays out institutionally in domestic settings.

So there is some scope in the article 10, article 11 and P1–3 case law to argue for a more deliberative and participatory model of democracy. Indeed there is an argument that article 8 may also offer support for this. Article 8's right to respect for private and family life has been interpreted to include respect for health, working relationships and certain environmental concerns. In at least some of the article 8 case law concerning environmental matters the Court has looked at the process by which the state has regulated article 8 rights to see if there has been consultation and thorough examination.<sup>3</sup>

In several cases the Court has indicated that it will regard state decisions as more likely to comply with the Convention where there has been democratic

<sup>3</sup> Rory O'Connell, 'Towards a Stronger Conception of Democracy in the Strasbourg Convention' (2006) *European Human Rights Law Review* 281–293.

domestic consideration of the measure. Sometimes, this has been a modest requirement of democratic consideration.<sup>4</sup> The Court's respect for domestic democratic consideration is likely to be most pronounced when the relevant domestic institutions have carefully considered the human rights issues through political and expert processes, including careful judicial consideration of the rights involved.<sup>5</sup> Where there has been no dedicated consideration of a measure by the domestic institutions, this has counted against the state. This was the case in the original *Hirst* judgment as the Court observed the UK Parliament had simply reinstated traditional restrictions on prisoner voting.<sup>6</sup> A thorough rights-based examination of the issues may mean the Court approves measures that in other contexts it would find violated the Convention. The *Animal Defenders International* judgment shows how the Court looks more favourably on domestic decisions which have been the product of sustained democratic debate and forensic analysis that explicitly considers how to balance the Convention rights.

In requiring states to demonstrate that they have carefully considered the human rights issues, pursued different consultative processes and assessed proportionality, the Court would be nudging states to adopt more rational deliberative processes; in this sense these suggestions are examples of the procedural turn in the Court's case law.<sup>7</sup> This is desirable in itself, but it is also a limited approach.<sup>8</sup> What happens, after all, if the state goes through such a process and arrives at the same conclusion? And without addressing wider issues of participation, inclusion and equality, it is no more than a call for better evidence-based decision-making.

The prisoner voting saga may offer a test case of how the Court should approach a claim that the state has engaged in a thorough consideration of a restriction on a Convention right and concluded that the restriction was justified. The Court has indicated that a blanket ban on prisoners voting is a breach of the Convention, but the UK (and apparently the Committee of

<sup>4</sup> *Hirst v United Kingdom* (No. 2) App no 74025/01 (2006) 42 EHRR 41.

<sup>5</sup> Not covered in this work, but the efforts of some European states to weaken judicial independence is also problematic.

<sup>6</sup> *Sukhovetsky v Ukraine* App no 13716/02 (2007) 44 EHRR 57.

<sup>7</sup> Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 Human Rights Law Review 473; Oddný Mjöll Arnardóttir 'Organised Retreat? The Move from "Substantive" to "Procedural" Review in the ECtHR's Case Law on the Margin of Appreciation' (2015) *European Society of International Law (ESIL) 2015 Annual Conference (Oslo)*; Janneke Gerards and Eva Brems, *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017).

<sup>8</sup> Peter Cumper and Tom Lewis, 'Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights' (2019) 68 International & Comparative Law Quarterly 611.

Ministers) believe this requires only tokenistic administrative changes. This issue will no doubt come back to the Court. Is this a situation like *Animal Defenders International*, where the Grand Chamber (narrowly) agreed that the UK's careful assessment of free expression in the context of political advertising justified a finding of non-violation even though there was considerable precedent suggesting otherwise? There are, however, differences between the *Hirst* situation and the *Animal Defenders International* situation. In the *Hirst* case the Court found that the situation in the UK itself breached the Convention. This is not just a matter of the UK having to consider what the Convention principles mean in relation to decisions involving other states. The Court's view has been repeated in many cases from the UK, and reaffirmed by the Grand Chamber in *Scoppola*. Further, the restriction on prisoner voting goes to the very substance of the right in a way that the political advertising restriction did not. The applicant in *Animal Defenders International* had other means to engage in political advocacy through appearing on broadcasted programmes, advertising in print media, social media and so forth. Convicted prisoners in the UK system are effectively completely disenfranchised, leaving aside the possibility of temporary release on licence. A final distinction is that whereas the restriction in *Animal Defenders International* was adopted in order to support political equality, the prisoner disenfranchisement rule cuts against inclusion in the political process. For these reasons, the domestic consideration of (and support for) the restriction should not lead the Court to find the situation compatible with the Convention.

This highlights the importance of Anne Phillips's critique that deliberative democracy must not just be a plea for better deliberation but must include considerations of equality and inclusion. The Court has largely worked to promote more inclusive voting rights across Europe, addressing problems of exclusion based on race, mental disability and bankruptcy, for instance. The Court has striven to ensure universal suffrage, even if this phrase was not included in P1-3's text. There is more to be done and which can be done within the confines of the Convention. First, the Court will need to consider how to uphold its core ruling in the prisoner disenfranchisement cases, else responses like the UK's to *Hirst* will largely void that decision of meaning. This is not just a UK challenge; Russia has also shown itself reluctant to address prisoner voting rights.

Second, the Court needs to be open to considering argument about practical inclusion in the electoral process. Most of the voting rights cases to date have concerned formal exclusions. Yet people can also be excluded because of any number of indirect means, practices and structures. Persons with nomadic lifestyles, disabilities (physical and mental) and literacy

problems must also be offered the opportunity to participate in electoral politics. So Travellers and Roma may not have settled addresses for electoral registration purposes; the fact that they have a nomadic lifestyle may even mean they move from one constituency to another (or perhaps even across national boundaries). Persons with certain physical disabilities may have difficulty accessing polling stations or reading ballot papers. The same may be true also of those with sight impairment or who cannot read. The elderly and the sick and those in institutions may all in practice have difficulty exercising their voting rights. In such situations the Court must be willing to require exemptions to general requirements and to require reasonable adjustments to ensure that people are not excluded in practice from exercising their democratic rights.

Third, there is one important and common formal exclusion which the Court has so far not addressed. This relates to the position of non-nationals. The Court's unreflective willingness to accept nationality-based restrictions on voting rights is especially troubling on any democratic model. The Court itself has canvassed the arguments on residence-based restrictions in a very thorough and convincing manner, but the very arguments which suggest the legitimacy of residence-based restrictions also point to the illegitimacy of blanket bans on non-nationals voting. Within the context especially of the European Union, European states have made important efforts to recognise voting rights for European Union citizen non-nationals in relation to local elections and European Parliament elections. However, generally speaking, this franchise extension does not apply to national political voting processes. Clearly certain categories of non-nationals are significantly affected by the decisions of national political institutions. This applies especially to those who reside for many years in a host state and have made it the centre of their lives. There are situations where it may be appropriate to continue to exclude non-nationals or certain categories of non-nationals from voting in national political elections, but the acceptance of a blanket ban seems more unjustifiable than even in the context of prisoners. As debates about immigration policy and treatment of resident non-nationals are frequently important in national politics, the exclusion of the persons most directly affected by such policy decisions is problematic.

These issues about inclusion mainly relate to the active electoral right, the right to vote. The Court has indicated that it does not apply the same standards of proportionality in cases involving the right to vote as it applies in relations to articles 8–11. In cases involving the right to run for election and electoral process decisions, the Court has been more deferential still. The Court has developed case law that tackles arbitrariness, problems of clarity and absence



of fair procedures. However, its record on inclusion in this area is even more circumspect than in the right to vote cases. The Court's reluctance to be drawn into issues of language policy means that there is some scope for states to adopt policies that disadvantage linguistic minorities. Even here, though, the Court has indicated there are some limits. The Court has broadly indicated that states are free to adopt measures to promote minority representation and measures to support consociational arrangements. Specifically, in relation to consociationalism, the Court has striven to ensure that special measures for the main groups in society do not have the effect of excluding other minority groups on racial or ethnic grounds. This is evident in cases like *Sejdic and Finci*, albeit that the failure of Bosnia Herzegovina to implement the decision highlights problems of the efficacy of the Court system.

As regards the threat that economic inequality and private wealth can deform the public and political spheres and wield undue influence in politics, the Court has shown some awareness of the issue. The Court has highlighted that states can claim a legitimate interest in requiring political candidates to make disclosures about their personal wealth, for instance. In particular, the *Animal Defenders International* case demonstrates Grand Chamber awareness of the importance of ensuring political equality in the public sphere even if this means regulating free expression, indeed what in many ways is core political expression.

Nevertheless, the Convention itself is of limited effectiveness in the economic sphere. This might well be expected in a system designed to uphold liberal representative democracy. There is little that the Convention can say about issues of economic equality: it says very little even about social and economic rights. It protects free expression, free association, electoral rights, most tellingly perhaps property rights and some social rights like the right to education, but not – explicitly at least – the right to work, the right to health, the right to social security and the right to an adequate standard of living. In the Council of Europe, social and economic rights are more the preserve of the European Social Charter system, with rather different mechanisms of monitoring and enforcement than we are used to in the Convention system. To the extent that this means the main European human rights mechanisms do not address social and economic rights (in the main), this has some risks for democratic practice. Individuals leading insecure lives, lacking resources or leisure and concerned about threats to their livelihood and security may not be incentivised to participate in the political system. Or even more worryingly, they may become disillusioned with the liberal representative model of democracy on offer if they perceive that it has failed them.

There is some possibility for the Convention to offer indirect protection to social and economic rights. To the extent that the Convention can be interpreted to offer some protection to these rights, it should be welcome as moving somewhat towards the goal of a more inclusive and participatory democratic model. It has to be acknowledged that this is necessarily indirect and limited and unlikely to address significant questions of economic inequality that affect political equality. The Court can consider these issues of economic and political equality in other ways.

As mentioned above, the Court has made it clear that states are permitted to regulate, even restrict, political rights so as to protect political equality from the threat of economic inequality. The Court's positive obligation doctrine suggests that something more than mere permission is possible. Consider, for instance, the article 10 case law. Here, the Court has generally underlined the role of the state as the ultimate guarantor of pluralism in relation to free expression. This has considerable bite in relation to state broadcasters, where the state is directly involved as in *Manole*. Yet there are also potential implications here for privately owned and run media. Pluralism and access to diverse viewpoints suggest that private wealth should not be allowed to monopolise key fora for public communication. A deliberative model of democracy would require public decisions to be made based on the exchange of reasons between free and equal participants, in a context where participants can consider diverse opinions, sources of evidence and discourses. This exchange of reasons is endangered if the mass media which helps shape public discourse is itself controlled by a small minority who benefit either from their wealth or having privileged access to the political elite (or both). Such a concentration of control might lead to a narrowing of the range of opinions, evidence and discourses available to persons deliberating. This suggests the state may need to ensure a degree of transparency in communication fora or to adopt rules on ownership. The Court should develop its positive obligations doctrine to require states to make clear who owns different media and to ensure there is not too great a concentration of media resource in a small number of hands. This might require the Court to take a stance on just what amounts to too great a concentration, but this is a task that some constitutional courts have been willing to do.

The danger posed by excessive concentration of media in a small number of wealthy owners is not just a matter of private wealth, though; there may be unhealthy links between powerful economic and political actors. Populist or autocratic legalist regimes (and not just them) may seek to limit the scrutiny they receive by taking advantage of powers in relation to private media. Where the state plays any role in allocating private media resources, it should be done on a transparent and impartial basis, with no room for political favouritism.

Again, in the context of article 10, the Court will also need to consider the role of digital media. While digital media offer enormous potential to allow diverse and free expression of opinion, there are multiple challenges. Digital media can be restricted by the state, manipulated by foreign states or by persons with resources taking advantage of the inertia of the law in responding to new technologies. They can also pose a threat to the inclusivity of political processes, as digital media can be abused to attack women or ethnic minorities. These are issues where the Court will need to consider its traditional regard for a balanced approach – overregulation may stifle free expression while underregulation might allow for manipulation of the political process and harm an inclusive political system.

A deliberative, inclusive and participatory approach to article 10 therefore must consider the scope to develop positive obligations in relation to the risk of private wealth dominating means of communication, as well as considering challenges to deliberation and inclusion in the context of some individuals having access to positions of media influence thanks to political links, and the risks posed by digital media. The development of article 8 and article 10 to include a right to information, in at least some circumstances as defined by the Court, also highlights another avenue to protect participation.

The article 10 case law emphasises the importance of civil society, journalists, academic researchers and others with a watchdog role being able to assess state-held information. However, changes in modern governance suggest that the next avenue should logically be to extend this line of cases to instances where the state has subcontracted its responsibilities in some way to private economic or other actors. The modern state frequently expects private organisations to discharge functions that either used to be discharged by the state or which are state functions. This could include the provision of education services, health services, care homes, even prisons and security. Such organisations are involved in activities that affect the rights of individuals and broader public interests. There is the potential for such private organisations to harm individual rights or the broader public interested, especially if they are organised on a for-profit basis or perhaps motivated by a confessional ethos. To support a participatory model of democracy, such organisations must be open to scrutiny. If police forces can be required to release information in the public interest, then, for instance, so should privately run but state-funded prisons or schools or hospitals. As the Convention increasingly puts the states under duties to regulate certain private enterprises through the Court's positive obligations doctrine – say, those involved in environmentally dangerous activities or care provision – then the watchdog function should mean that there should be access at least to the state-held information about such private bodies, if not indeed direct access to information that such private organisations hold.

The article 8 and article 10 case law highlights the potential for journalists, non-governmental organisations, academic researchers and others in civil society to use the Convention to promote more openness and transparency necessary for a more deliberative and participatory democratic system, even in relation to private economic actors. The article 11 case law offers some glimmer of hope that the Court is aware of the need for there to be effective mechanisms of participation in the civil society and the economic sphere. In the first part of this century we saw a series of cases from the UK, Turkey and Russia that developed the Court's approach to trade union rights and specifically collective bargaining. Trade unions are an important voice in the public sphere who, through pooling of individual commitment, can agitate on behalf of individuals and groups that may otherwise have only formal access to power. The defence of trade union rights was therefore to be welcomed even if the Court has indicated in *RMT* that there are limits to how far it will take this case law. The defence is all the more important given concerns about the weakening of labour rights and the waning of the welfare state in the last fifty years. This is a concern not just in states like the UK where trade union rights have been eroded over several decades but also in some states where autocratic legalist regimes or others may seek to undermine or co-opt trade unions.

The above suggestions about articles 10, 11 and 8 highlight the limits and potential of the Convention in promoting democratic practices outside the official political sphere. However, the scope of the electoral rights remains a challenge. The language of P1–3 points to the irony that even within the official political sphere the liberal democratic representative vision of the Convention is surprisingly limited. The Court has consistently refused to bring local elections, presidential elections, referendums and other ways of participating in public life within the purview of P1–3. In this sense the Convention is a much narrower instrument than, say, the ICCPR with its article 25. That P1–3 does not refer to broader notions like participation in public affairs or government of one's own country leaves out significant ways of participating in public affairs. The wider notion of participation in public affairs could include local councils, referendums, presidential elections and indeed other areas like consultative and deliberative practices (deliberative polls or citizen juries), appointments to official bodies and other public appointments. This textual limit means it is difficult to see how deliberation, participation and inclusion can be promoted more broadly.<sup>9</sup> This is not just a

<sup>9</sup> See Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2000), 149 calling for more group representation not just in national legislatures but wider official bodies and non-official bodies wielding significant political or economic power.

matter of a missed opportunity to support deliberative, participatory and inclusive democracy; these fora outside the limited formal political arena (for the purposes of the Convention anyway) may be the target of parties with anti-democratic tendencies to colonise the state.<sup>10</sup> Unscrupulous political actors could use referendums to enhance executive power, manipulate elections for local councils or presidential elections, appoint cronies to political appointments and control or avoid consultative and participatory mechanisms. And the Court's current interpretation of the Convention would provide little redress.

Whilst the linguistic difference between P1–3 and article 25 ICCPR provides strong support for the Court's approach so far, it also comes up against the principle that the Convention must be given an effective interpretation, one capable of evolving to address contemporary threats to human rights. Some judges have given convincing reasons as to why referendums should at least sometimes be included in the ambit of P1–3. The Court itself has indicated that there may be the possibility to bring some presidential elections within the scope of P1–3, though it has not yet found a suitable case to rule this way. For the protection of an effective political democracy it would seem important to expand P1–3's scope. Even before the adoption of the Convention, the practical relevance of the legislature in domestic politics was often questionable.<sup>11</sup> The period since 1950 has seen the centrality of the legislature often eclipsed by the role of the executive and the development of links with networks outside of the formal political system. For the Convention vision of a political democracy to be meaningful, this trend must either be reversed or the Convention must adapt. Given the improbability of reinventing a dominant legislature, adaption seems to be the order of the day. And this is especially important given the rise of executive governments in some Council of Europe states that increasingly arrogate powers to the executive, undermine the mechanisms of political and legal accountability and not infrequently do this by means of referendums<sup>12</sup> or other legal mechanisms.

<sup>10</sup> Müller gives the example of populist parties that seek to control the civil service: Jan-Werner Müller, *What Is Populism?* (Penguin 2017), 44–45.

<sup>11</sup> Chris Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (Cambridge University Press 2018), 148.

<sup>12</sup> This was the purpose of the (unsuccessful) Italian referendum of December 2016 discussed in Helen Hardman and Brice Dickson, 'Conclusions' in Helen Hardman and Brice Dickson (eds) *Electoral Rights in Europe: Advances and Challenges* (Taylor & Francis 2017), 212–215. It was also the purpose of the successful Turkish referendum of 2017. As this book was being finished, Russia's president announced a package of major constitutional change that might go to a referendum and was widely reported as consolidating his power as he left the office.

While it may go beyond the wording of P1–3, it would be defying the purpose of having a guarantee of voting and candidacy rights if these could be ignored simply by switching power to the executive. And it should not be lost sight of that referendums are not immune to Convention scrutiny if they interfere with Convention rights. State action that limits Convention rights through referendums can be scrutinised, and that scrutiny can, as part of any proportionality inquiry, consider whether the process of adopting a limit was lawful, legitimate, necessary – and deliberative, participatory and inclusive.

The other sense in which the Convention is arguably limited as regards the official political sphere is that its model is one of a national liberal representative democracy. The Court has concluded that P1–3 applies to elections for the European Parliament, and this is welcome but it is difficult to see how the Convention can contribute to enhancing EU democracy until the EU actually becomes party to the Convention. Should that happen, the model of deliberative democracy in particular may be one suited to application to the complex supranational institution that is the EU.

To the objection that these suggestions push the Court in a more activist direction, there are three comments.

First, the suggestions here are modest and based very much on the approach already adopted in the Court's jurisprudence. In most cases they involve incremental development (extending the developing freedom of information approach for example), or adapting existing concepts like positive obligations, indirect discrimination and reasonable adjustment to political concerns.

Second, the Court itself recognises that the interpretation of the Convention must be an evolving and effective one, taking into account contemporary threats to human rights. The benefits of liberal representative democracy must be protected, but we must also acknowledge the limitations of this model of democracy and the changing contexts of the twenty-first century. The liberal democratic model has not precluded the rise of illiberal democracy or autocratic legalism; indeed, the limitations of liberal representative democracy may have facilitated such threats. Enhancing the Convention's ability to promote deliberation, inclusion and participation would at least recognise these limitations. If it is not possible to say they would successfully address them all, they would at least be striking at some of the key problems.

Third, these proposals are aimed at ensuring that all people are included on an equal basis in the political process, that they can participate in decisions affecting them and that they can contribute to public deliberation. All these seem eminently legitimate, even urgent, tasks for a human rights court.